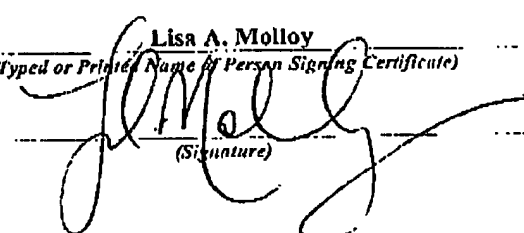
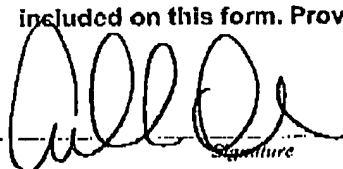


CERTIFICATE OF TRANSMISSION BY FACSIMILE (37 CFR 1.8)			Docket No. ROBI-4162
Applicant(s): Russell Warner			
Application No. 10/728,375	Filing Date 12/03/2003	Examiner Barrett, S.	Group Art Unit 3676
Invention: FROZEN DOOR OPENER			
RECEIVED CENTRAL FAX CENTER MAY 19 2005			
<p>I hereby certify that this <u>Appeal Brief</u> (Identify type of correspondence) is being facsimile transmitted to the United States Patent and Trademark Office (Fax. No. <u>703-872-9306</u>) on <u>May 19, 2005</u> (Date)</p> <p style="text-align: center;"><u>Lisa A. Molloy</u> (Typed or Printed Name of Person Signing Certificate)  (Signature)</p> <p style="text-align: center;">Note: Each paper must have its own certificate of mailing.</p> <p style="text-align: right;">RECEIVED MAY 20 2005 OIEP/JCWS</p>			

TRANSMITTAL OF APPEAL BRIEF (Small Entity)					Docket No. ROBI-4162	
In Re Application Of: Russell Warner						
Application No. 10/728,375	Filing Date 12/03/2003	Examiner Barrett, S.	Customer No. 5409	Group Art Unit 3676	Confirmation No.	
Invention: FROZEN DOOR OPENER						
<p style="text-align: center;"><u>COMMISSIONER FOR PATENTS:</u></p> <p>Transmitted herewith in triplicate is the Appeal Brief in this application, with respect to the Notice of Appeal filed on: May 6, 2005</p> <p><input checked="" type="checkbox"/> Applicant claims small entity status. See 37 CFR 1.27</p> <p>The fee for filing this Appeal Brief is: \$250.00</p> <p><input type="checkbox"/> A check in the amount of the fee is enclosed.</p> <p><input type="checkbox"/> The Director has already been authorized to charge fees in this application to a Deposit Account.</p> <p><input checked="" type="checkbox"/> The Director is hereby authorized to charge any fees which may be required, or credit any overpayment to Deposit Account No. 19-0513</p> <p><input type="checkbox"/> Payment by credit card. Form PTO-2038 is attached.</p> <p>WARNING: Information on this form may become public. Credit card information should not be included on this form. Provide credit card information and authorization on PTO-2038.</p> <div style="display: flex; justify-content: space-between; align-items: flex-end;"> <div style="width: 40%;">  <p>Arlen L. Olsen Reg. No. 37,543 Schmeiser, Olsen & Watts 3 Lear Jet Lane, Suite 201 Latham, N.Y. 12110 (518) 220-1850</p> </div> <div style="width: 40%; text-align: right;"> <p>Dated: May 19, 2005</p> </div> </div>						
cc:			<div style="border: 1px solid black; padding: 5px;"> <p>I hereby certify that this correspondence is being deposited with the United States Postal Service with sufficient postage as first class mail in an envelope addressed to "Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450" [37 CFR 1.8(a)] on</p> <p style="text-align: center;">(Date)</p> <p style="text-align: center;">_____ Signature of Person Mailing Correspondence</p> <p style="text-align: center;">_____ Typed or Printed Name of Person Mailing Correspondence</p> </div>			

MAY 19 2005

ATTORNEY DOCKET NO. Robi-4162

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Appellant: Russell Warner

Serial No.: 10/728,375

Filed: December 3, 2003

For: FROZEN DOOR OPENER

) Examiner: Suzanne L. Dino Barrett

) Art Unit: 3676

Commissioner For Patents
Alexandria, VA 22313

Appeal Brief

This appeal is being filed in response to the Office Action mailed on February 8, 2005.

Real party in interest

The real party in interest in this appeal is Russell Warner, Ontario, Canada.

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Related appeals and interferences

01 FC:2402 250.00 DA

None.

Status of claims

Claims 1-9, 12, 14 and 15 are currently pending. Claims 10-11 and 13 are cancelled.

Claims 1-9, 12, 14 and 15 are on Appeal.¹

¹ Claim 15 is not currently included in any substantive rejection, but is cited on the PTOI form 326 as being rejected.

Serial No.: 10/728,375

Page 1 of 14

Status of amendments

A response to a non-final office action was issued on September 8, 2004 regarding claims 1-9, 12, 14 and 15. A final office action was issued on November 18, 2004 rejecting claims 1-9, 12, 14 and 15. An after final amendment was submitted on December 15, 2004 cancelling claim 9 and amending claims 1 and 4. An advisory action was issued on December 27, 2004 refusing entry of the December 15, 2004 after final amendment. On January 18, 2005 a request for reconsideration of the advisory action was submitted in response to the after final amendment. On February 8, 2005 a non-final rejection was issued based on the claims in the September 8, 2004 amendment. Accordingly, claims 1-9, 12, 14 and 15 currently stand rejected based on the February 8, 2005 non-final rejection.

Summary of claimed subject matter

Regarding claim 1, the present invention relates to a device for opening a frozen or stiff seal formed between a door and a door frame (paragraph bridging pages 5 and 6). The device includes interconnected first 2 and second plate 3 portions (page 7, last paragraph) of substantially equal length and each having an upper and lower surface and a width which is constant along an entire length of the first and second plate portions (See Fig. 3), the first plate portion 2 being in spaced relation to the second plate portion 3 to form a substantially right angle about a central point 5 of from 45 degrees to 85 degrees (page 6, lines 1-7). The first plate portion 2 is inserted for placement in a frame opening 25 between the door frame 15 and the door 17 by a user (page 6, lines 8-18). The second plate portion 2 is then pushed in a first direction A by the user towards an upper surface of the door frame 15 (page 6, lines 18-25). A

result of the angled relationship between the first and second plate portions, the device pivots about the central point (page 7, line 11-18) whereby an outer edge of the central point 5 biases within the frame opening 25 and moves the first plate portion 2 into engagement with an underside of a lip of the door 17, allowing the user to apply moderate leverage to the device and effect the first plate portion to pivot upwardly, about the central point 5, from the placement between the door frame 15 and the door 17 and force the car door 17 away from an adjacent relationship with the door frame 15 so as to separate and break the frozen or stiff seal formed between the door 17 and the door frame 15 (Page 6, lines 8-25).

Regarding claim 4 the present invention relates to a one-piece unitary device for opening a frozen or stiff seal formed between a door and a door frame (paragraph bridging pages 5 and 6). The device comprising first 2 and second plate 3 portions (page 7, last paragraph) of substantially equal length and each having an upper and lower surface and a width which is constant along an entire length of the first and second plate portions (See Fig. 3), wherein the first plate portion 2 is adapted for placement in a frame opening 25 between the door frame 15 and the door 17, and the second plate portion 3 is adapted for use by a user, the first plate portion 2 being in spaced relation to the second plate portion 3 to form a substantially right angle about a central point 5 of from 45 degrees to 85 degrees (page 6, lines 1-7). The user can maneuver the device, as a result of the angled relationship of the first 2 and second 3 plate portions. The user can also insert the first plate portion 2 for placement in a frame opening 25 between the door frame 15 and the door 17 by the user, wherein the upper surface of the first plate portion 2 engages a lip of the door 17 and the second plate portion 3 is then pushed in a first direction A by the user towards an upper surface of the door frame 15 and, as a result of the angled relationship

Serial No.: 10/728,375 Page 3 of 14

between the first 2 and second 3 plate portions, the device pivots about the central point, whereby an outer edge of the central point biases within the frame opening 25, allowing the user to apply moderate leverage to the device and effect the first plate portion 2 to pivot upwardly, about the central point 5, from the placement between the door frame 15 and the door 17 and force the car door away from an adjacent relationship with the door frame 15, so as to separate and break the frozen or stiff seal formed between the door 17 and the door frame 15.

Claim 9 claims the device of claim 1, wherein the first 2 and second 3 plate portions are disposed from 60 degrees to 85 degrees (page 6, lines 1-7) from each other about the central point 5.

Grounds of Rejection to be Reviewed on Appeal

I) Claims 1-8, 12 and 14 stand rejected under 35 USC 103(a) over Sutton, US patent 4,788,893 and Thomas et al., US patent 5,337,632.²

II) Claim 9 stands rejected under 35 USC 103(a) over Sutton, US patent 4,788,893 and Thomas et al., US patent 5,337,632, as applied to claim 1 and further in view of Crowley, US patent 6,799,491 or Moses D164,705 or Waddell D442,840.

Argument

I) Claims 1-8, 12 and 14 stand rejected under 35 USC 103(a) over Sutton, US patent 4,788,893 and Thomas et al., US patent 5,337,632.

² Claim 15 is not currently included in any substantive rejection, but is cited on the PTOI form 326 as being rejected.

The examiner committed error in arriving at a *prima facie* case of obviousness in rejecting claims 1-8, 12 and 14 because the combination does not disclose each and every feature of the claimed invention. In particular the examiner has not met the burden of showing, *inter alia*, the following claimed feature:

first 2 and second plate 3 portions (page 7, last paragraph) of substantially equal length and each having an upper and lower surface and a width which is constant along an entire length of the first and second plate portions (emphasis added).

United States Patent No. 4,788,893 (Sutton), is directed to opening door handles (with a view to avoiding broken nails and such). More specifically, in operation the device disclosed in Sutton is meant to be placed under a door handle and then lifted upwardly so as to assist in opening the door handle. By contrast, the device disclosed and claimed in the present invention is meant to be placed between the car door and door frame, and then LEVERED by the user or pulled, so as to engage the lip of the door, in order to break the frozen seal and assist in opening the car door itself, as can be noted with reference to the description on page 7 at lines 11 to 18.

Accordingly, the Appellant is of the view that Sutton is not of a similar nature to that of the present invention, as the device described therein is designed as a "hook" of plastic construction (see column 2, lines 1 and 19 of Sutton) which is to replace one's fingertips as the operative force in opening an automobile door. As such, the device disclosed in Sutton would be ill-suited for opening frozen doors, in the manner as indicated by the present invention, as the plastic construction may break as the user attempts to lever the door open. With reference to Figure 1 of Sutton, it can be seen that the width of the device disclosed therein narrows towards the upper end of the body where the key ring aperture is located. However, the present invention,

as defined in the amended claims submitted on September 8, 2004, comprises first and second plate portions having a width which is constant along an entire length of the first and the second plate portions, including the upper end where the key ring aperture is located. By virtue of the present invention having a constant width at the upper end where the key chain is located (and where the user grasps the device), the device has a greater surface area at this point in which a user can use to effect body leverage unto the device to break the frozen seal and assist in prying open the door.

With respect to United States Patent No. 5,337,632 (Thomas *et al*), Thomas *et al* reference is directed to opening beverage can tops or door handles (with a view to avoiding broken nails and such), and, as such. In Figure 1 of Thomas *et al*, it can be plainly seen that the device described in Thomas *et al* does not have two angled portions which are of substantially equal length and which are compact. In Figure 1 of Thomas *et al*, the tail end 26 is clearly of a longer length than the hook member 22 which engages the underside of the beverage can top or door handle, and, as such, by virtue of its length, can be somewhat cumbersome when attached to a key chain. By contrast, the present invention, as defined in the amended claims submitted on September 8, 2004, comprises first and second plate portions which are compact, and of substantially equal length, which reduces the likelihood of the first or second plate portions breaking or separating from each other during use, as can be noted with reference to the description on page 8 at lines 2 to 8. Thomas *et al* makes no mention of such a structure. Such a construction also allows for easier, much more convenient attachment to a key chain.

The second error committed by the Examiner in arriving at a *prima facie* case of obviousness in rejecting claims 1-8, 12 and 14 is that the primary reference to Sutton teaches

away from the claimed invention. In particular the examiner has not met the burden of obviating, *inter alia*, the following claimed feature:

a device having a first plate portion in spaced relation to the second plate portion to form a substantially right angle about a central point of from 45 degrees to 85 degrees. (emphasis added).

Sutton also clearly indicates, on column 2 at line 55, that the hinge is limited to opening to "approximately 45 degrees". Appellant notes that, for the purpose envisioned by the device disclosed in Sutton, this is adequate, because the device described in Sutton is not meant to be biased between the car door frame and the door to lever a frozen door open, it is merely to grasp the underside of a door handle and be lifted upwardly to manipulate the door handle in opening the door. By contrast, the present invention, as defined in the amended claims submitted on September 8, 2004, is directed to a device having a first plate portion in spaced relation to the second plate portion to form a substantially right angle about a central point of from 45 degrees to 85 degrees. By virtue of this manner of construction, when the user inserts the first plate portion for placement in a frame opening between the door frame and the door, and the second plate portion is then pushed in a first direction by the user towards an upper surface of the door frame, the upper surface of the first plate portion engages a lip of the door and, as a result of the angled relationship between the first and second plate portions, the device pivots about the central point, whereby an outer edge of the central point biases within the frame opening, allowing the user to apply moderate leverage to the device and effect the first plate portion to pivot upwardly, about the central point, from the placement between the door frame and the door, and force the car door away from an adjacent relationship with the door frame so as to separate and break the frozen or stiff seal formed between the door and the

door frame. This is completely absent from the device described in Sutton.

II) Claim 9 stands rejected under 35 USC 103(a) over Sutton, US patent 4,788,893 and Thomas et al., US patent 5,337,632, as applied to claim 1 and further in view of Crowley, US patent 6,799,491 or Moses D164,705 or Waddell D442,840.

The first error committed by the Examiner in arriving at a *prima facie* case of obviousness in rejecting claim 9 is that the primary reference to Sutton teaches away from the claimed invention. In particular the examiner has not met the burden of obviating, *inter alia*, the following claimed feature:

the device of claim 1, wherein the first 2 and second 3 plate portions are disposed from 60 degrees to 85 degrees (page 6, lines 1-7) from each other about the central point 5. (emphasis added)

Sutton's description clearly indicates, on column 2 at lines 54-56, that, "...the four bumps 12 on hinge 10 function to LIMIT the opening of the hinge 10 to approximately 45 degrees (emphasis supplied). Claim 9 defines that the first plate portion of the device was in spaced relation to the second plate portion to form a substantially right angle about a central point of from 60 degrees to 85 degrees.

A response to the Final Office Action of November 18, 2004 was filed on December 15, 2004. In doing so, claims 1 and 4 were further amended to distinguish from the device disclosed in United States Patent No. 4,788,893 (Sutton), to define that the first plate portion of the device was in spaced relation to the second plate portion to form a substantially right angle about a central point of from 60 degrees to 85 degrees. Claim 9, which previously defined this limitation, in that the first and second plate portions were disposed from 60 degrees to 85 degrees from each other about the central point, was then cancelled from the application, in light of the above-noted amendments to

claims 1 and 4. The Appellant further refuted the applicability of United States Patent No. 5,337,632 (Thomas *et al*) by noting that Thomas *et al* clearly indicates, on column 3 at line 55, that the hook is "curved away from the handle portion at approximately 180 degrees", and, as such, could not be considered as being of a similar nature to the present invention. Clearly, Thomas does not supply the defect of the claimed range as taught by Sutton.

An Advisory Action was then issued by the Examiner on December 27, 2004, wherein the Examiner alleged that Figure 2 of United States Patent No. 4,788,893 (Sutton) illustrated an angle of 65 degrees between the first and second plate portions. Accordingly, the Examiner stated that the amendment to claims 1 and 4 given in the response filed on December 15, 2004, which defined that the first and second plate portions were disposed from 60 degrees to 85 degrees from each other about the central point did not now, in the Examiner's view, place the present application in condition for allowance or distinguish over the device disclosed in United States Patent No. 4,788,893 (Sutton).

The Examiner in rejecting claim 9 further used United States Patent No. 6,799,491 (Crowley) and United States Design Patents Nos. D164,705 (Moses) and D442,840 (Waddell) to obviate the claimed range of 60 to 85 degrees. The Examiner alleges that the devices disclosed in United States Design Patents Nos. D164,705 (Moses) and D442,840 (Waddell) are all examples of pry tools having an angle between the handle and pry portion in the range of 45-85 degrees, and, in combination with Sutton, render the present application as claimed in claim 1, unpatentable. However, the Examiner has failed to provide any motivation why one of ordinary skill in the art would be led to such references when the primary reference teaches away from the combination. Thus, the rejection is improper.

Serial No.: 10/728,375

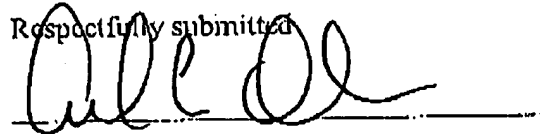
Page 9 of 14

A second error below is that the Examiner relied upon the teaching of the drawing in Sutton to teach the claimed range of 60 degrees to 85 degrees, when the drawing disagrees with the specification. MPEP § 2125 is clear on the Office's position with respect to such an argument. A Request for Reconsideration was filed on January 18, 2005 in response to the Advisory Action of December 27, 2004. In the Advisory, the Examiner contended that Figure 2 of Sutton seems to illustrate a door handle opener having an angle of 65 degrees between the two portions. In a request for reconsideration, Appellant argued that the provisions of MPEP § 2125 and the decision in *In re Wright*, 569 F.2d 1124, 193 USPQ 332 (CCPA 1977) do not allow for such a disagreement. The Examiner's position that the angle of 65 degrees does not agree with the specification of Sutton. Sutton clearly indicates, on column 2 at lines 54-56, that, "...the four bumps 12 on hinge 10 function to LIMIT the opening of the hinge 10 to approximately 45 degrees."

Respectfully, Appellant requests the board reverse the Examiner's decision below.

Date: 5-19-2005

Respectfully submitted



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Serial No.: 10/728,375

Page 10 of 14

ATTORNEY DOCKET NO. Robi-4162

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Appellant: Russell Warner

)

Examiner: Suzanne L. Dino Barrett

)

Serial No.: 10/728,375

)

Art Unit: 3676

)

Filed: December 3, 2003

)

)

For: FROZEN DOOR OPENER

)

)

Commissioner For Patents
Alexandria, VA 22313

APPENDIX - CLAIMS ON APPEAL

Appendix

1. A device for opening a frozen or stiff seal formed between a door and a door frame, said device comprising interconnected first and second plate portions of substantially equal length and each having an upper and lower surface and a width which is constant along an entire length of the first and second plate portions, the first plate portion being in spaced relation to the second plate portion to form a substantially right angle about a central point of from 45 degrees to 85 degrees, whereby the first plate portion is inserted for placement in a frame opening between the door frame and the door by a user, and the second plate portion is then pushed in a first direction by the user towards an upper surface of the door frame, and, as a result of the angled relationship between the first and second plate portions, the device pivots about the central point, whereby an outer edge of the central

Serial No.: 10/728,375

Page 11 of 14

point biases within the frame opening and moves the first plate portion into engagement with an underside of a lip of the door, allowing the user to apply moderate leverage to the device and effect the first plate portion to pivot upwardly, about the central point, from the placement between the door frame and the door and force the car door away from an adjacent relationship with the door frame so as to separate and break the frozen or stiff seal formed between the door and the door frame.

2. The device of claim 1, wherein the device is a one-piece unitary device.

3. The device of claim 1, wherein the first plate portion is adapted for placement in a frame opening between the door frame and the door, and the second plate portion is adapted for use by the user.

4. A one-piece unitary device for opening a frozen or stiff seal formed between a door and a door frame, said device comprising first and second plate portions of substantially equal length and each having an upper and lower surface and a width which is constant along an entire length of the first and the second plate portions, wherein the first plate portion is adapted for placement in a frame opening between the door frame and the door, and the second plate portion is adapted for use by a user, the first plate portion being in spaced relation to the second plate portion to form a substantially right angle about a central point of from 45 degrees to 85 degrees, whereby the user can maneuver the device, as a result of the angled relationship of the first and second plate portions, and insert the first plate portion for placement in a frame opening between the door frame and the door by the user,

wherein the upper surface of the first plate portion engages a lip of the door and the second plate portion is then pushed in a first direction by the user towards an upper surface of the door frame and, as a result of the angled relationship between the first and second plate portions, the device pivots about the central point, whereby an outer edge of the central point biases within the frame opening, allowing the user to apply moderate leverage to the device and effect the first plate portion to pivot upwardly, about the central point, from the placement between the door frame and the door and force the car door away from an adjacent relationship with the door frame, so as to separate and break the frozen or stiff seal formed between the door and the door frame.

5. The device of claim 1, wherein said second plate portion defines an aperture therein.

6. The device of claim 5, wherein a ring of a key chain is inserted through the aperture and the device is secured to a key chain.

7. The device of claim 6, wherein the aperture is positioned on an upper end of the second plate portion.

8. The device of claim 1, wherein the device is formed of metal, plastic, fiberglass or aluminum.

9. The device of claim 1, wherein the first and second plate portions are disposed from 60 degrees

to 85 degrees from each other about the central point.

12. The device of claim 1, wherein the device is placed in the frame opening at several different locations along a length of the frame opening between the door frame and the door, and the device is applied by the user to break the frozen or stiff seal formed between the door and the door frame.

14. The device of claim 1, wherein the key ring is integrally formed as a portion of the device.

15. The device of claim 14, wherein the device is formed through injection molding.